No. 82-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ITT CONTINENTAL BAKING CO., INC.
HOSTESS CAKE DIVISION,
Petitioner,

vs.

BAKERY SALESMEN, DRIVERS, WAREHOUSEMEN AND HELPERS, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Is a dispute over a unilaterally established work rule arbitrable under a collective bargaining agreement with no management rights clause, no substantive language covering the matter in dispute, a broad no-strike commitment and a promise to arbitrate "any charge of violation of this agreement, charge of discrimination, grievance or dispute"?

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STATEMENT OF THE CASE

The sole issue in this case, as the court of appeals correctly discerned, is whether a dispute concerning a long-standing company policy comes within an arbitration clause covering "any charge of violation of this agreement, charge of discrimination, grievance or dispute". App. A-1—A-2. Clearly *not* at issue, as petitioner suggests, is whether a multiemployer agreement permits a party to refrain purposefully from bargaining in order to have an arbitrator set terms and conditions of employment. There are no new or complex issues of federal law presented here, but only the application of this Court's well-established rules for determining the arbitrability of labor disputes under a broad arbitration clause in a particular collective bargaining agreement.

Respondent Bakery Salesmen, Drivers, Warehousemen and Helpers Local Union No. 51, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 51), commenced this action in the United States District Court for the Eastern District of Michigan under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce an arbitration award issued under a collective bargaining agreement with petitioner ITT Continental Baking Co., Inc., Hostess Cake Division (Company). The district court held the dispute was not within the scope of the arbitration clause and therefore denied enforcement. Local 51 appealed to the United States Court of Appeals for the Sixth Circuit, which unanimously reversed the district court's holding on arbitrability and remanded the case for further proceedings consistent with its opinion. The court of appeals also denied the Company's petition for rehearing.

The underlying grievance concerned the Company's "check-in" procedure. Local 51 represents approximately 100 of the Company's driver-sales employees in the Detroit metropolitan area. Some customers pay the driver by check or in cash, and the drivers must turn in and account for these collections to the Company at the daily "check-in". He must prepare a settlement sheet recording his daily receipts of money and checks, which he then puts in an envelope. After signing, sealing, and dating the envelope, he drops the envelope into a chute leading to a metal safe. He receives no receipt or other verification that he has in fact enclosed the money and checks shown on the settlement sheet in the envelope.

Thereafter the driver has no control over what happens to the envelope. Different employees of the Company open the safe and put the envelopes in bags, which are taken by an armored car service to a bank. Days later perhaps, bank tellers open the envelopes and record the deposit totals for individual drivers, noting any discrepancy between the amounts listed on the

envelope and the actual contents. The drivers are charged or credited for these shortages or overages, regardless of amount or fault. If a driver fails to pay a shortage he is suspended.

Although this procedure was unilaterally established by management, it has existed for many years. App. E-2. Recently, however, Local 51 members had sought to change aspects of it through NLRB proceedings and an increasing number of grievances. The occasion for these challenges was that, increasingly, the Company's drivers were being charged for shortages which were caused by theft committed by other Company employees (not driver-salesmen) or through the negligence of bank employees. Thus driver Tom Bowker was required to pay a $400.00 cash shortage that turned out to be the bank's fault. In another case the Company forced driver Tom Pakledinaz to pay a $600 shortage that appears to have resulted from theft of his envelope by a supervisor. After that, Local 51's secretary-treasurer filed a policy grievance on behalf of all driver-salesmen protesting the Company's refusal to provide the drivers with a receipt or other verification for the money and checks that they turn in during the check-in procedure. App. E-7.

Arbitrator Harry J. Dworkin heard and decided the dispute. He found that no express contract language covered the check-in procedure and that the subject had never been discussed in negotiations. The Company argued to the arbitrator that all aspects of the check-in procedure, by reason of its longevity, had become a binding past practice tantamount to a contractual term. The arbitrator, however, ruled that the dispute "relat[ed] to terms and conditions of employment not covered by the Agreement, and therefore, constitutes an arbitrable issue", App. E-9.[1] He then resolved the dispute on its merits, holding

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[1] It was in this context that he observed that the grievance, which did not charge the Company with a violation of any provision of the contract, was "in the nature of an 'interest' dispute." *Id.*

that the drivers' request for a receipt to verify they had in fact deposited into their envelopes the money and checks they listed on the settlement sheet was "fair, reasonable and practical". App. E-16.[2]

The district judge, in refusing to enforce the award, stated:

> "We believe that the interpretation given to the arbitration clause is simply not reasonable. Although the language in the arbitration clause may be ambiguous we do not believe it can be reasonably interpreted to allow such 'interest' arbitration. The arbitrator's interpretation is such an extraordinary encroachment on the powers of management that to imply such a meaning more specific language is necessary to support it." App. B-6

The court of appeals reversed, stating:

> "The District Court's view would turn the Supreme Court's rules of construction upside down because it would exclude from arbitration all disputes concerning company policies, procedures, and working conditions not covered by some express term of the agreement. The *Steelworkers Trilogy* clearly contemplates arbitration of disputes not covered by the express terms of the agreement, including disputes covering company policies, procedures and working conditions." App. A-7.

The court of appeals then discussed the *Trilogy's* rules of construction in determining the arbitrability of labor disputes, App. A-6—A-7, and decided that the instant grievance was arbitrable.

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[2] The arbitrator retained limited jurisdiction for six months to provide a "reasonable trial period" for the changes he ordered so that the award would remain in effect or be modified "subject to review on the basis of experience."

REASONS FOR DENYING THE WRIT

Summary of Argument

One fundamental flaw runs throughout the Company's arguments: it silently assumes that the arbitrator made a factual finding that its check-in procedure work rules constituted a past practice equivalent to a binding contractual term, and then deliberately engaged in "interest" arbitration by altering that contractual term. The district court accepted this mischaracterization of the award in this case; the court of appeals rejected it. The court of appeals agreed with Local 51 and the arbitrator that the dispute below was an ordinary "rights" arbitration over a work rule "relating to terms and conditions of employment *not* covered by the contract", App. E-9 (emphasis added). Therefore, consonant with *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the dispute was arbitrable. The arbitrator did *not* find, as the Company had urged, that the challenged aspect of the check-in procedure had become part of the contract. Once this is realized, petitioner's entire argument collapses.

In addition, the Company presents a variety of arguments suggesting that the decision below violates the National Labor Relations Act in various ways. All of these arguments are specious attempts to add new dimensions to a garden-variety work-rules grievance contrary to the *Trilogy*. Equally important, none of these arguments were raised or briefed before the arbitrator, in the district court, or in the court of appeals until, as an afterthought, in the petition for rehearing. They are, therefore, outside the parameters of considerations for granting a petition for certiorari, Sup. Ct. R. 17.

I. The Grievance Below Was Arbitrable And The Resultant Arbitration Award Enforceable.

No novel or important issue of federal law is presented by this case. The basic principles governing the arbitrability of disputes arising under collective bargaining agreements were clearly enunciated over 20 years ago in the celebrated *Steelworkers Trilogy*.[3] Since that time, this Court has seldom had reason to return to the issues of arbitrability resolved in the *Trilogy*, but in every such instance has emphasized the strong presumption in favor of the arbitrability of such disputes. *E.g.*, *Gateway Coal* v. *United Mine Workers*, 414 U.S. 368 (1974); *Int'l Union of Operating Engineers Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487 (1972). The courts of appeals have for the most part faithfully enforced this presumption.[4]

In this case, the district judge refused to enforce an arbitration award on the grounds that the underlying dispute was nonarbitrable. It is unclear whether the district court did so because it erroneously believed that the arbitrator had engaged in "interest" arbitration, or because it felt that arbitrations over disputes not covered by express contract language trenched too deeply on management prerogative, or both. In so doing, however, the district judge ignored the *Trilogy* presumption of arbitrability and instead dispensed his own brand of industrial justice. He determined that disputes not covered by express contract language were not arbitrable unless specifically included by the words of the arbitration clause of the agreement, i.e., exactly the opposite of the *Trilogy's* rule that disputes are arbitrable unless specifically excluded from the arbitration provisions. App. B-6.

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[3] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 383 U.S. 593 (1960).

[4] *See* Morris, "Twenty Years of Trilogy: A Celebration", in *Decisional Thinking of Arbitrators and Judges, Proceedings of the Thirty-Third Annual Meeting, National Academy of Arbitrators* 331 (1981).

The Court of Appeals for the Sixth Circuit reversed the district court, correctly applying the *American Mfg.* and *Warrior & Gulf* presumptions in a case where, as here, a broad arbitration clause is the *quid pro quo* for a broad no-strike agreement: "Doubts should be resolved in favor of coverage". 363 U.S. at 582.

The court of appeals applied the *Trilogy* rules correctly. It considered, *inter alia,* the breadth of the no-strike clause, the breadth of the arbitration clause, and the lack of express exclusionary language elsewhere in the agreement. Contrary to the Company's contention, the court of appeals did not replace the *Trilogy* with a new and different eight-part test applicable only to multi-employer collective bargaining agreements. Instead, the court correctly pointed out that the *Trilogy* "applies with even greater force in situations involving local disputes governed by multi-employer agreements", App. A-8. The court then looked at the totality of circumstances and concluded the dispute was arbitrable. Significantly, the court of appeals did not find that *any* factor militated against a finding of substantive arbitrability in this case.

The Company's argument that the grievance raised an "interest" dispute hinges upon the erroneous assumption that the arbitrator *changed* or fashioned a *new* term in the parties' argeement rather than simply resolving a dispute over an omitted case[5] or the reasonableness of a work rule not covered by the

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[5] "Rights" disputes relate "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. Ry. Co.* v. *Burley,* 325 U.S. 711 (1945). Labor arbitrators properly and routinely perform gap-filling functions. *Warrior & Gulf, supra,* 353 U.S. at 580-581; *Gateway Coal, supra,* 414 U.S. at 378.

contract.[6] But the Company's contention that the arbitrator changed the contract rests upon its argument that all aspects of the check-in procedure, because of their longevity, had become an implied term of the contract, a point it argued vigorously to the arbitrator and in the courts below. However, the arbitrator, who must be the exclusive judge of such matters, did *not* find that the check-in procedure was a past practice that had become part of the agreement and instead determined that the dispute "relat[ed] to terms and conditions of employment not covered by the Agreement, and, therefore, constitutes an arbitrable issue." The Company's alternate contention, that the award impermissibly added terms to the agreement because they lack support in either practice or substantive contract language, negates traditional and entirely proper functions of the labor arbitrator in "rights" disputes. Underlying both contentions is the Company's effort to build a fortress upon the equivocal phrase "in the nature of an interest dispute" which appears at one point in the lengthy opinion.

The flaws in the Company's approach are apparent. If the Court overturns the arbitrator's decision on whether a binding past practice existed, the Court will contravene its own *Enterprise Wheel* holding that the merits of an award are not to be reviewed by the courts. 363 U.S. at 596. Whether a practice of some longevity has become contractually secured goes to the heart of the "rights" arbitrator's function to interpret and apply

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[6] Conventional "rights" arbitration law permits union challenges to plant rules through the grievance and arbitration procedure on the ground that they are "unfair, arbitrary, or discriminatory. *** Rules promulgated unilaterally by the employer may be challenged when established — the union need not delay its challenge until employees have been disciplined for violation of the rules. ***Plant rules must be reasonable not only in their content but also in their application." Elkouri & Elkouri, *How Aribtration Works*, 518-519 (3d Ed. 1973).

the collective bargaining agreement.[7] On the other hand, if the Court holds a grievance not arbitrable because it would cause a change in one of the Company's practices without substantive contract language to support it, the Court will have contravened its *Warrior & Gulf* holding, namely:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement." 363 U.S. at 581.

To hold, with the Company, that an arbitrator's source of law is confined to contract language or past practice and that he changes the agreement if he uses other criteria for judgment under a broad arbitration clause, would reverse another *Warrior & Gulf* holding.[8] And if the Court reads the award to mean, because the arbitrator said the grievance raised something of an "interest" dispute, that he had indeed found a binding past practice or was otherwise making a new agreement for the parties, the Court will overrule still another *Enterprise Wheel* holding, namely: "A mere ambiguity in the opinion accompa-

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[7] "[T]he mere existence of a practice, without more, has no real significance. Only if the practice clarifies an imperfectly expressed contractual obligation or lends substance to an indefinitely expressed obligation or creates a completely independent obligation will it have some effect on the parties' relationship." Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*," 59 Mich. L. Rev. 1017, 1020 (1961). Practices will not be held binding without acceptability, and as the court of appeals observed, this award contained findings from which it could reasonably be concluded that in recent years the practice lost whatever acceptability it may once have had. App. A-4. "Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created." *Id.*, at 1017.

nying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award", 363 U.S. at 598.[9]

In short, although presented in the guise of a post-award challenge to the arbitrability of an alleged "interest" dispute, the Company's argument in this case boils down to an old and familiar phenomenon: the Company is dissatisfied because it lost before the arbitrator. It now wishes to relitigate the merits of a garden-variety work rule controversy to the top of the federal court system.

If the Court were to grant this petition and reverse the court of appeals, it would in effect be overruling the *Steelworkers Trilogy* and reviving the defunct *Cutler-Hammer* doctrine.[10] It will be an invitation to the lower courts to engage in plenary review of the merits of arbitration awards, under the guise of determining whether or not they are non-arbitrable "interest" awards, vacating or enforcing the awards based upon the in-

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[8] "The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity..., its consequence to the morale of the shop, [and] his judgment whether tensions will be heightened or diminished." 363 U.S. at 582.

[9] Read in context and in accordance with a presumption of validity, the statement appears to mean nothing more than that the dispute is not covered by any express language in the contract.

[10] *Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, *aff'd* 297 N.Y. 519 (1947).

dividual judge's rendition of the contract's meaning, the industrial common law, and past practice. More importantly, it will be an invitation for disgruntled parties to bring to the federal courts precisely the type of minor disputes that this as most collective baragaining agreements mandate be resolved by an arbitrator's award which "shall be *final and binding* upon both parties hereto", App. F-23 (emphasis added).

II. The Decision Below Invades Neither The Statutory Duty To Maintain Agreements In Effect Nor The Obligation To Bargain Collectively; In Fact It Promotes Both.

The Company's contentions that the arbitrator invaded the federal labor statute by encroaching upon its "statutory right to resolve local issues through the process of collective bargaining" (Pet. 17-18) or forcing a "mid-term contract change" upon it (Pet. 9) reflect fundamental misconceptions of the nature of a collective bargaining agreement. Indeed they continue to turn the *Trilogy* upside down.

The collective bargaining and arbitration processes are *not* mutually exclusive or antithetical.

> "[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself. *** The grievance procedure is...a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement."[11]

The collective bargaining agreement does *not* fix all employment terms with specificity; arbitration is the means agreed upon to resolve many of them; and in fact arbitration is the statutorily preferred means for resolving such disputes under

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[11] *Warrior & Gulf, supra,* 363 U.S. at 578, 581; *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 437, n. 3 (1967).

collective baragaining agreements. 29 U.S.C. § 173(d).[12] Therefore, in deciding whether arbitration will be compelled or an award enforced, the judicial inquiry under *Warrior & Gulf* has nothing to do with whether the parties could or should have settled the dispute at the collective bargaining table.

> "[T]he judicial inquiry under § 301 must be *strictly confined* to the question whether the reluctant party did *agree to arbitrate* the grievance or *did agree* to give the arbitrator power to make the award he made."
>
> 363 U.S. at 581 (emphasis added).

Nothing in this Court's prior decisions or federal labor policy supports the notion that a mandatory subject of bargaining, if not negotiated, cannot be arbitrated.

Of course, terms actually negotiated and agreed to at the bargaining table cannot be set aside by an arbitrator;[13] but as to matters not covered by the contract, the "processing of disputes through the grievance procedure is actually a vehicle by which meaning and content are given to the collective bargaining agreement", *id.* Thus the contention that an award under a

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[12] "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

[13] Section 8(d) of the Labor Management Relations Act, 29 U.S.C. § 158(d), requires in pertinent part that the parties "continue...in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract...until the expiration date of such contract..." and lifts the duty to bargain with respect to "any modification of the terms and conditions contained in a contract..., if such modification is to become effective before" the reopening date of the contract.

broad arbitration clause resolving a dispute not covered by the agreement will force a mid-term contract change not only is at war with the *Trilogy* but a patent contradiction in terms as well.[14]

The Company's contention also cuts deeply into the *American Manufacturing* principle that an arbitration clause is the quid pro quo for a union's no-strike commitment and if there is no exception in the no-strike clause then none should be read into the grievance clause.[15] Any incentive for a union to give up the right to strike in return for an employer's commitment to submit any dispute to arbitration is necessarily dissipated if the employer is permitted to weasel out of its arbitration promises because of an implied exception for disputes that should have been negotiated, *after* the union's hands are tied by the no-strike clause.[16] Thus the Company's contention would violate the *Gateway Coal* canon that, "[a]bsent an explicit expression of... [a contrary intention], the agreement to arbitrate and the duty not to strike should be construed as having co-terminous application", 414 U.S. at 382.

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[14] "Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a 'misinterpretation' or 'gross mistake' by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract. That is what the 'final and binding' language of the arbitration clause says. In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract." St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look At Enterprise Wheel And Its Progeny*, 75 Mich. L. Rev. 137, 140 (1977).

[15] 363 U.S. at 567. *See, also Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235, 248 (1970).

[16] *Cf. Boys Markets*, 398 U.S. at 248.

In short, assuming without conceding that these Company contentions have been properly raised,[17] they present no new or important issues warranting review by this Court. Stripped of overblown rhetoric they, too, are bottomed on the fallacy that this Court sits to substitute its judgment for the arbitrator's as to whether the Company's evidence proved a past practice binding upon the union or, put somewhat differently, as to whether the arbitrator was factually correct in holding the dispute not covered by the contract. Nothing in the opinion below supports the Company's apocalyptic concern for the future of multi-employer bargaining absent review here. The court of appeals merely applied established *Trilogy* criteria to the circumstances of these parties, their contract and this dispute, without ruling that a different result would obtain if only single-employer bargaining were involved. It is true, as is frequently the case, that this dispute might have been settled at the bargaining table, just as it is true that the Company might have narrowed the arbitration clause at the bargaining table. That neither happened is no cause for depriving Local 51 of the benefit of its bargain nor for review of this case by this Court.

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[17] The arguments under discussion were *not* addressed in the opinions below because the Company did not raise them until it petitioned for rehearing in the court of appeals. Therefore this Court should not consider them as properly raised in the petition. "We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. ***" *J. Truett Payne Co.* v. *Chrysler Motors Co.*, 451 U.S. 557, 568 (1981).

CONCLUSION

The petition for certiorari should be denied.

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